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IN THE

SUPREME COURT OF THE UNITED STATES

NO. ---1338

October Term, 1970

* * *

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Appellant-Respondent

v.

JAMES LEE MARION,
Appellee-Petitioner

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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v.

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* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The State of Texas prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit reversing the district court below, entered in the above entitled case on November 6, 1970.

OPINION BELOW

The opinion delivered in the court below, and not yet reported, is appended to this Petition as Appendix "A," and the State of Texas' Petition for Rehearing En Banc, Appendix "B," was denied on January 4, 1971. Reported at 302 F.Supp. 913 (1969) is the opinion of the United States District Court, and a copy thereof is attached hereto as Appendix "C." A Stay of Mandate was granted by the United States Court

of Appeals to and including February 18, 1971. The Judgment of the Court appears as Appendix "E."

JURISDICTION

As indicated above, the opinion of the United States Court of Appeals was entered on November 6, 1970, (See Appendix "A") and the State of Texas' Petition for Rehearing En Banc was denied January 4, 1971 (See Appendix "B").

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and under Rule 19, §1(b), Sup.Ct. Rules.

QUESTION PRESENTED

Did the Circuit Court err when it reversed the district court below and interpreted *Witherspoon v. Illinois*, to mean that the Defendant's right to an impartial jury was impaired where no more than 3 out of 71 jurors examined were excused for voicing general reservations to the death penalty after the trial judge and the federal district judge had both agreed that their answers implied they could not, under any circumstances, vote for the infliction of the death penalty?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment 6:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

Constitution of the United States, Amendment 14, §1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

Code of Criminal Procedure, Article 35.16(b)1:

"(b) A challenge for cause may be made by the State for any of the following reasons:

"1. That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where the State is seeking the death penalty; . . ."

STATEMENT OF THE CASE

The State of Texas has custody of Marion pursuant to the judgment and sentence of the 72nd District Court of Lubbock County, Texas, in Cause No. 92901, styled *The State of Texas v. James Lee Marion.* The indictment in said cause charged Marion with the murder, with malice aforethought, of Mrs. Fred Turner. The facts of the case revealed that the Turner house in Midland occupied an entire city block. Mr. Turner was away and his wife was at home alone. At approximately 4:12 a.m. on October 29, 1963, three of the Turners' neighbors heard screams somewhere in the neighborhood. Neighbor Galley notified the police and within four minutes patrols reached the area. They cruised throughout this vicinity until daylight, but were unable to discover anything suspicious. At 7:40 the Turners' maid, Juanita Young, appeared for work and when she observed muddy tracks both outside and inside the house, she retreated to a neighbor's home and called Mr. Scharbauer, Mrs. Turner's son-in-law. He arrived with his wife and asked the neighbor to call the Sheriff and the Scharbauers and the maid proceeded to the Turner home. He and the maid ascended the stairs and discovered that Mrs. Turner's bedroom door had been battered in with a pinch bar and inside they found her lifeless, blood-stained body on the floor. They descended the stairs and went outside to greet the Sheriff. Mrs.

Scharbauer was left alone in the library crying. An armed Negro man, whom she identified as the Petitioner, entered and asked her if she lived there and when she answered in the negative, hit her on the head with the pistol he was carrying. At this juncture, Scharbauer, the Sheriff and a deputy entered and Marion surprised them and, at pistol point and by means of threats to further harm Mrs. Scharbauer, lined them up in the library. After some hesitation he abandoned his dominion over the four and ran out the front door. The maid an the yard boy were outside and saw him leave. Chase ensued, but he was able to evade his pursuers. Some four hours later he was apprehended in the attic of a small business armed with a .380 revolver. On the floor in the room below the entrance to the attic was found an identification holder containing a picture of Mr. Turner.

Soon after the discovery of Mrs. Turner's body the coroner arrived. He and a pathologist testified that massive bruises about the face and head, administered by a weapon similar to the .380 pistol, caused Mrs. Turner's death. The pistol was shown by expert testimony to have hair comparable in many respects to samples taken from the corpse imbedded in the butt and clip thereof. Samples of mud taken from Marion's shoes were shown to have the same soil characteristics as that found in the Turner home. Three buttons found in or near Mrs. Turner's bedroom matched those on the shirt Marion was wearing and from which three had been recently torn. Plaster casts were made of footprints outside the Turners' window and his shoes were shown to fit the same perfectly. Marion's pants had flecks of human blood on them.

Two able attorneys were appointed to represent Marion and the court, upon its own motion, transferred

venue of the case from Midland County to Lubbock County, Texas.

Prior to trial, another attorney, H. J. Blanchard, the State Senator from Lubbock County, Texas, was appointed as additional counsel to assist the two lawyers appointed theretofore.

Marion plead not guilty and on March 21, 1964, the jury returned its verdict finding him sane at the time of the act, sane at the time of trial and guilty of murder with malice. He was assessed the death penalty. Marion appealed his case to the Texas Court of Criminal Appeals, and on December 2, 1964, the Court affirmed the judgment against him. An amended opinion of affirmance followed on February 2, 1965. See *Marion v. Texas,* 387 S.W.2d 56 (1965), attached hereto as Appendix "D." Marion's Motions for Rehearing were overruled.

Marion thereafter made application for writ of habeas corpus to the United States District Court for the Northern District of Texas, Lubbock Division, in Civil Action No. 5218 and said application was denied on May 5, 1965, by written order. The district court's judgment was affirmed by the Fifth Circuit at 363 F.2d 139 (1966) and certiorari was denied by this Honorable Court at 386 U.S. 934 (1967).

Marion again filed a federal writ which was dismissed for his failure to have exhausted the remedies available to him in the courts of the State. He then filed a writ in the convicting state court and a hearing, at which Marion was present, was held. After this hearing, the state court filed its Findings of Fact and Conclusions of Law with the Texas Court of Criminal Appeals which again denied him relief.

Finally, Marion filed his last application for federal

collateral relief, again in the District Court in Lubbock, and after another evidentiary hearing was denied relief on July 30, 1969. The court's reasons therefor are fully set forth in a learned and lengthy Memorandum Opinion, reported, as aforesaid, at 302 F.Supp. 913 (1969), appended hereto as Appendix "C."

REASONS FOR GRANTING THE WRIT

A review on writ of certiorari should be granted where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter, and where the circuit courts have decided an important question of federal law which has not been, *BUT SHOULD BE,* settled by this Court. Supreme Court Rule 19, 1(b).

The Fifth Circuit by its decision in this case, has rendered an interpretation of *Witherspoon v. Illinois,* 391 U.S. 510 (1968), which in their own words, ". . . will establish a precedent . . ." for this entire circuit and which interpretation is not clearly supported by any prior holding of the United States Supreme Court and is directly contrary to the holdings in other circuits, see *Bell v. Patterson,* 402 F.2d 394 (10th Cir., 1969); to the holdings of the highest criminal court in this state, see *Pittman v. State,* 434 S.W.2d 352 (Tex. Crim., 1968), as well as the Supreme Courts of Washington, Ohio, Florida and Illinois. (See *State v. Adams,* 458 P.2d 558; *State v. Wigglesworth,* 248 N.E.2d 607; *Paramore v. State,* 229 So.2d 855; and *People v. Bernette,* 258 N.E.2d 793, respectively.) Specifically, the circuit court has set aside the death penalty rendered by the jury (while simultaneously authorizing Texas to resentence Petitioner to life, for which Texas has *no* procedure), on the grounds that the alleged improper exclusion for cause of a small number of jury-

men, deprived Marion of the impartial jury to which he is entitled under the Sixth and Fourteenth Amendments.

A total of 71 jurors were examined before 12 were chosen to sit on the jury. 26 of the 71 were excused for cause on the basis of their attitudes regarding the death penalty. The pertinent parts of the questions and answers asked each juror excused for cause because of such attitudes are contained in Appendix A of the district court's reported opinion, appended hereto as Appendix "C." The district court concluded that 16 of the 26 unequivocally stated that they could not vote for the death penalty under any set of circumstances. Of the remaining 10, two were excused with the agreement of defense counsel, and a third was excused for an adequate reason other than scruples against the death penalty. Venireman Mr. Dunn, who stated that "I think I probably could." (vote for the death penalty) was nonetheless excused for cause, the trial judge stating "There was too much hesitation and he qualified it with saying that he probably could." Several other veniremen, notable Mrs. Robbins, Mr. Nutt, Mr. Akard, Mr. McKee and Mr. Nelson, were excused for answers which the trial judge and the district court thought *implied* that they could under no circumstances render a death verdict.* The district court found that three prospective jurors, Mrs. Hobbs, Mr. Moore and Mrs. Speck, were excused solely for their conscientious scruples against the death penalty.

The district court commented that several jurors who had expressed reservations about the death penalty were not excused, and concluded that under the

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*"Most courts feel that in matters of voir dire great discretion should be given the trial judge." 42 So. Calif. Law Rev. 329, 338, citing annotation 99 A.L.R.2d 7 (1965).

total circumstances the State had not systematically excluded those who voiced only conscientious scruples against the infliction of the death penalty.

The State of Texas respectfully says that the spirit and intent of the *Witherspoon* holding have been violated by this decision and that such a precedent, if any, should be set by this honorable court above.

The State of Texas respectfully submits that the holding of the Tenth Circuit in *Bell v. Patterson,* supra, is correct, and that the spirit and intent of *Witherspoon* are stretched beyond credulity by holding that a jury fails to represent a cross-section of society, thereby losing its neutrality, as a result of the erroneous exclusion of a very small number of the total number of veniremen questioned. In the case at bar, of the total number excused *only three* jurors were excused for voicing general objections to the death penalty, and neither was any effort made by defense counsel to rehabilitate them nor was any objection to their exclusion advanced. Moreover, on Marion's jury, two jurors who *were* selected and *did serve* on the jury specifically expressed reservations about the death penalty.

How can it possibly be said that the exclusion of these three jurors resulted in a jury that failed to reflect "the evolving standards of decency that mark the progress of a maturing society?" How can it be said when the other excluded jurors acknowledged an unwavering attitude in this regard, and two jurors who specifically expressed reservations about the death penalty did in fact serve?

CONCLUSION

The spirit and intent of the *Witherspoon* holding

were not complied with in this case, and certiorari should be granted not only to review the Fifth Circuit's holding, but to restore uniformity of "*Witherspoon*-interpretations" among the circuits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gilbert J. Pena, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served on counsel for the Appellee by depositing same in the United States Mail, postage prepaid, addressed to Mr. Richard J. Clarkson, Burnett and Childs, P. O. Box 3707, Odessa, Texas 79760, on this the ____ day of _____, 1971.

GILBERT J. PENA
Assistant Attorney General

APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 28421

JAMES LEE MARION,
Petitioner-Appellant,

versus

DR. GEORGE J. BETO, Director
Texas Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas

(November 6, 1970)

Before GEWIN, GOLDBERG and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge: This is an appeal from the denial, after hearing, of a Texas state prisoner's application for writ of habeas corpus.[1] A prior appeal to this Court from a district court denial of habeas relief is reported as *Marion v. Harrist,* 5 Cir. 1966, 363 F.2d 139, cert. denied 386 U.S. 934. Both petitions stem from the petitioner's conviction for murder and resulting death sentence.

[1]The district court's written opinion is reported at 302 F. Supp. 913 (N.D. Tex. 1969).

At the outset we may quickly dispose of Marion's allegations that (1) the trial court erroneously failed to make an independent determination of the voluntariness of his two written confessions and of statements made by appellant to psychiatrists, (2) that the trial court improperly charged the jury on the issue of the voluntariness of the confessions, (3) that the trial court erroneously refused to allow pretrial discovery of the confessions, (4) that appellant was denied the right to counsel at critical stages in the proceedings, and (5) that the trial court's instruction to the jury on the question of insanity deprived the appellant of the due process of the law. We believe that these matters have been fully and fairly developed and properly disposed of adversely to appellant in Sections I, II, III and IV of the district court's opinion reported at 302 F.Supp. 913.

The appellant also urges that the death penalty constitutes cruel and unusual punishment in violation of the Eighth Amendment to the Constitution. The Supreme Court of the United States stated in *Trop v. Dulles,* 356 U.S. 86, 78 S.Ct. 590, 597, 2 L.Ed.2d 630 (1958), albeit in dictum, that the death penalty did not violate the constitutional concept of cruelty. Despite recent attacks on that language we have seen nothing to indicate that the Supreme Court's position has changed. See also *Sims v. Eyman,* 9 Cir. 1969, 405 F.2d 439; *Segura v. Patterson,* 10 Cir. 1968, 402 F.2d 249.

The appellant claims that the Texas practice of allowing the jury discretion to assess the death penalty without directions or guidelines violates due process and that the Texas single verdict procedure violated due process by forcing the defendant to choose between presenting evidence to mitigate punishment or maintaining his privilege against self-incrimination. Simi-

lar sentencing schemes have been approved by several courts. *Andres v. United States,* 333 U.S. 740, 68 S.Ct. 880, 92 L.Ed. 1055 (1948); *Sims v. Eyman,* supra; *Segura v. Patterson,* supra; *Petition of Ernst,* 3 Cir. 1961, 294 F.2d 556. Cf. *Spencer v. Texas,* 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967); *Giaccio v. Pennsylvania,* 382 U.S. 399, 405 footnote 8, 88 S.Ct. 518, ——, 15 L.Ed. 2d 447, 451 (1966).

The one remaining matter is a *Witherspoon*[2] argument by appellant that the trial court excluded jurors who voiced only general conscientious scruples against the infliction of the death penalty. A prior determination was made in the courts of the State of Texas that *Witherspoon* was not violated; the district court made an independent determination based on the same facts and reached the same conclusion. We disagree, and reverse and remand for a new trial.

In reversing the district judge, we do so not because of disapproval of his findings of fact but because we disagree with the legal conclusion which flows from those facts. A total of 71 jurors were examined before 12 were chosen to sit on the jury. 26 of the 71 were excused for cause on the basis of their attitudes regarding the death penalty.[3] The district court concluded that 16 of the 26 unequivocally stated that they could not vote for the death penalty under any set of circumstances. Of the remaining 10, two were excused with the agreement of defense counsel, and a third was excused for an adequate reason other than scruples against the death penalty. Venireman Mr. Dunn,

---

[2]*Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

[3]The pertinent parts of the questions and answers asked each juror excused for cause because of such attitudes are contained in Appendix A of the district court's reported opinion.

who stated that "I think I probably could." (vote for the death penalty) was nonetheless excused for cause, the trial judge stating "There was too much hesitation and he qualified it with saying that he probably could." Several other veniremen, notably Mrs. Robbins, Mr. Nutt, Mr. Akard, Mr. MeKee and Mr. Nelson, were excused for answers which the trial judge and the district court thought *implied* that they could under no circumstances render a death verdict. The district court found that three prospective jurors, Mrs. Hobbs, Mr. Moore and Mrs. Speck, were excused solely for their conscientious scruples against the death penalty. The court below commented that several jurors who had expressed reservations about the death penalty were not excused, and concluded that under the total circumstances the State had not systematically excluded those who voiced only conscientious scruples against the infliction of the death penalty.

In *Witherspoon,* the Supreme Court stated:

> "Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." 391 U.S. at 521-522.

The Supreme Court further implied that doubts concerning the ability of a venireman to subordinate his personal views to his oath as a juror to obey the law of the state should be resolved against exclusion, stating in footnote 9, on page 515-516 of the opinion:

> "Unless a venireman states *unambiguously* that he would automatically vote against the imposi-

> tion of capital punishment no matter what the trial might reveal, it simply cannot be assumed that this is his position." (Emphasis added.)[4]

We note that this statement is in sharp contrast to the words of the Texas Court of Criminal Appeals in the post-*Witherspoon* case of *Pittman v. State,* 434 S.W.2d 352, 357 (1968):

> "It has long been the holding of this Court that if it is doubtful whether the juror has conscientious scruples in regard to the infliction of capital punishment, the court's action in sustaining the State's challenge for cause on that ground will be sustained on appeal. Burrell v. State, 18 Tex. 713; Sawyer v. State, 39 Tex.Cr.R. 557, 47 S.W. 650; Myers v. State, 77 Tex.Cr.R. 239, 177 S.W. 1167; Vickers v. State, 92 Tex.Cr.R. 182; 242 S.W. 1032; see also Article 35.21, V.A.C.C.P."

The bare question here then is whether the improper exclusion for cause of a relatively small number of the total number of veniremen questioned on the grounds of mere conscientious scruples against the death penalty deprives the defendant of the impartial jury required by the Sixth and Fourteenth Amendments. Several courts have answered this query in the negative. *Bell v. Patterson,* 10 Cir. 1968, 402 F.2d 394 (holding that the improper exclusion of 2 of 15 prospective jurors ultimately excluded on the death issue did not deprive the defendant of a jury composed of an impartial cross-section of the community); *State v. Mathis,* 52 N.J. 238, 245 A.2d 20, 27 (N.J. 1968), (stating in dictum that the improper exclusion of a single juror did not deprive the defendant of repre-

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[4]These words were emphatically repeated in *Boulden v. Holman,* 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969) and *Maxwell v. Bishop,* 398 U.S. 262, 90 S.Ct. ——, 26 L.Ed.2d 221 (1970).

sentatives from the anti-capital punishment section of the community); *Pittman v. State,* supra, (stating that the exclusion of three jurors whose answers had been ambiguous out of 42 jurors who were excluded on the death issue did not require reversal); *Scott v. State,* 434 S.W.2d 678 (Tex.Ct.Crim.App. 1968) (holding that the exclusion of several jurors without a full showing that they could not in any case vote for the death penalty did not require reversal, on the authority of *Pittman,* supra). These cases generally distinguish *Witherspoon* on the basis that in that case *all* of those excused had been improperly eliminated and therefore there could be no doubt that the *Witherspoon* jury had been constituted of only those members of the community who had attitudes positive toward the death penalty.

Several cases takes the opposing view, holding that even the improper elimination of one prospective juror requires reversal. *Woodard v. Maxwell,* 303 F.Supp. 690 (S.D. Ohio 1969); *People v. Schader,* 80 Cal. Rptr. 1, 457 P.2d 841, (Sup.Ct. 1969); *In re Hillary,* 79 Cal. Rptr. 733, 457 P.2d 565 (Sup.Ct. 1969).

This Circuit has never decided this precise question so that our decision here will establish a precedent, for the present at least. After some hesitation, we are inclined to agree with the cases last cited. The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society; indeed, many agree on moral or religious grounds that it is incomprehensible that an advanced society such as ours should yet engage in such practice. Given the weightiness of the subject involved it really does not follow that the improper exclusion of a relatively small number of the total veniremen examined does not prejudice the defendant's rights to an impartial cross-section of the community.

Where, as here, unanimity of decision is required to impose the death sentence, the stark reality is that one improperly excluded juror may mean the difference between life or death for a defendant. Although a defendant certainly has no assurance that a properly-empaneled jury will not impose the death penalty, it seems to us that in light of the vast difference in treatment which may result from the improper exclusion of a single venireman, even that degree of error is prejudicial to the rights of a defendant in a capital case.[5]

We therefore reverse[6] and remand this case to the district court with directions that the State of Texas be given the option of determining within a reasonable time to be fixed by that court whether to (1) resentence the defendant to a sentence not to exceed life imprisonment without a retrial on the issue of guilt,

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[5]Our holding is not inconsistent with the opinion of this Court in *Jackson v. Beto*, 5 Cir. 1970, —— F.2d —— [No. 29053, July 6, 1970]. In that case two of twenty-three veniremen testified to non-compliance with *Witherspoon*, while the trial judge testified that no venireman was excused unless he stated that he could not vote for the death penalty under any circumstances. The district judge resolved this conflict in the testimony by finding as a fact that no juror had been excused without proper questioning, and we concluded that his findings were not clearly erroneous. In the instant case the district court found that several veniremen were improperly excused. Nor does our holding conflict with *Smith v. Whisman*, 5 Cir. 1970, —— F.2d —— [No. 28194, September 16, 1970]. In *Smith* we held that the improper exclusion of veniremen in the selection of an alternate juror did not require reversal as long as the alternate juror is not needed, does not sit in on the deliberations or participate in the verdict, and provided that there is no indication that the alternate juror influenced the regular jurors or prejudiced the rights of the defendant.

[6]It should be understood that our holding that the improper exclusion of prospective jurors were prejudicial to the rights of the petitioner-appellant and requires reversal relates only to the punishment imposed and not to the legality of the conviction. *Witherspoon v. Illinois*, 391 U.S. 510, 522, footnote 21.

provided such procedure is appropriate under Texas law, or (2) vacate the appellant's conviction and sentence and retry him. If neither option is exercised within the time fixed by the district court the writ must be granted and the appellant released.

REVERSED and REMANDED, with directions.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28421

JAMES LEE MARION,
Petitioner-Appellant,

versus

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Nov. 6, 1970, 5 Cir., 1970, —— F.2d ——.)

(January 4, 1971)

Before GEWIN, GOLDBERG and SIMPSON, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX "C"

JAMES LEE MARION,

Petitioner,

v.

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,

Respondent.

Civ. A. No. 5-534.
United States District Court
N. D. Texas,
Lubbock Division
July 30, 1969.

Petitioner, who had been convicted of murder with malice aforethought and sentenced to death, petitioned for writ of habeas corpus. The District Court, Woodward, J., held that where there was no blanket excusing of all jurors with conscientious scruples concerning death penalty and three with such conscientious scruples actually served as jurors, though apparently three prospective jurors were excused solely because they did have conscientious scruples against death penalty, there was no pattern or scheme by court to exclude all jurors who had such scruples and the process of jury selection did not entitle accused to writ of habeas corpus.

Application denied.

1. Habeas Corpus #25.1(8)

Where there was no dispute as to facts in record that would place in question issue of voluntariness of confessions and trial court was not requested to make its own independent finding on question of voluntariness and state trial court was given opportunity to hear

claim on voluntariness in hearing on petition for writ of habeas corpus after conviction and state trial court determined that the confessions were voluntary, accused was not entitled to writ of habeas corpus on ground that trial court failed to make indipendent determination on voluntariness. Vernon's Ann.C.C.P. Tex. art. 11.07.

2. Criminal Law #532(1)

It is constitutionally required that trial court make independent determination of voluntariness before submitting confession to jury for consideration but there is no constitutional requirement for further submission to jury.

3. Criminal Law #736(2)

Where there was no request from accused's attorneys that trial court instruct on voluntariness but requests were directed to accused's mental capacity at time he made confessions and trial court did give instruction to jury on that issue and where at time of accused's trial there was no uniform state procedure for determining voluntariness and where state court on petition for writ of habeas corpus after conviction had determined that confessions were voluntary, issue as to confessions was properly submitted to jury. Vernon's Ann. C.C.P. art. 11.07.

4. Habeas Corpus #25.1(8)

Where accused's statements to psychiatrists were not highly inculpatory and psychiatrists' testimony concerned accused's sanity at time he made his confessions and his ability to recollect facts which was issue raised by accused, accused was not entitled to writ of habeas corpus on ground that trial court failed to make independent determination as to voluntariness of the statements made to psychiatrists.

5. **Criminal Law #1166(1)**

Though better practice is to make confessions available by pretrial discovery, no reversal for failure to do so is required unless prejudice is shown.

6. **Habeas Corpus #92(1)**

Where accused's claims, concerning denial of right to counsel at time he waived his examining trial and gave confessions, had been heard and passed on following full, fair and adequate evidentiary hearing, district court did not need to consider those claims on petition for writ of habeas corpus.

7. **Constitutional Law #268(2)**
Homicide #294(1)

Trial court's charge of "right-wrong" test on question of insanity at accused's trial for murder with malice aforethought was not inadequate, vague or indefinite and did not deprive accused of constitutional due process. U.S.C.A. Const. Amend. 14.

8. **Jury #108**

If jury is chosen by exclusion of veniremen for cause if they voice only general objections to death penalty or express conscientious or religious scruples against its infliction, a sentence of death cannot stand, and similarly jurors cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment; however, a prospective juror may be excluded because he is not willing to consider all penalties provided by state law or would vote against penalty of death regardless of facts and circumstances that might emerge. U.S.C.A.Const. Amends. 6, 14.

9. **Habeas Corpus #25.1(4)**

Where there was no blanket excusing of all jurors with conscientious scruples concerning death penalty

and three with such conscientious scruples actually served as jurors, though apparently three prospective jurors were excused solely because they did have conscientious scruples against death penalty, there was no pattern or scheme by court to exclude all jurors who had such scruples and the process of jury selection did not entitle accused to writ of habeas corpus.

10. Habeas Corpus #25.1(4)

Where accused presented no statistical evidence to support charge that Texas juries tend to discriminate on grounds of race in capital sentencing for crimes against white persons, the allegation was without merit and would not entitle accused to writ of habeas corpus.

11. Habeas Corpus #25.1(4)

Accused's claims that state practice of allowing jury discretion to assess death penalty without directions or guidelines violated due process and that single-verdict procedure was improper in forcing accused to choose between presenting evidence to mitigate punishment or maintaining his privilege against self-incrimination on question of guilt would not entitle accused to relief by way of writ of habeas corpus.

12. Criminal Law #1213

Imposition of death penalty for murder with malice aforethought did not constitute cruel and unusual punishment under Texas law.

Richard J. Clarkson and Warren Burnett, Odessa, Tex., for petitioner.

Allo B. Crow, Jr., Asst. Atty. Gen. of Texas, Austin, Tex., and James A. Mashburn, Dist. Atty., Midland, Tex., for respondent.

WOODWARD, District Judge.

MEMORANDUM OPINION

This memorandum opinion shall constitute the necessary Findings of Fact and Conclusions of Law to support the order of the Court denying Petitioner's Petition for a Writ of Habeas Corpus.

On a plea of not guilty, a Jury in the 72nd District Court of Lubbock County, Texas, convicted Petitioner of the felony offense of murder with malice aforethought of Mrs. Fred Turner and assessed the punishment at death. The verdict was dated March 21, 1964, and the Court of Criminal Appeals of Texas affirmed the judgment and sentence on December 2, 1964, and by a later amended opinion of February 2, 1965, 387 S.W.2d 56.

In Civil Action No. 5218, of The United States District Court for the Northern District of Texas, Lubbock Division, Marion v. Harrist, Petitioner filed his Petition for a Writ of Habeas Corpus, which was denied May 5, 1965. The Court of Appeals for the Fifth Circuit affirmed, Marion v. Harrist, 363 F.2d 139, and certiorari was denied by the United States Supreme Court, 386 U.S. 934, 87 S.Ct. 960, 17 L.Ed.2d 807. Some of the grounds alleged in the petition now before this Court were raised and decided in the 1965 habeas corpus proceedings.

The present petition was first filed in the 72nd District Court of Lubbock County, Texas, and a hearing, with the Petitioner present, was held December 19, 1968. The State trial Court, after the hearing, filed its Findings of Fact and the Texas Court of Criminal Appeals denied the petition for habeas corpus without a written opinion. There was a full, complete and fair evidentiary hearing held in the State District Court on this petition.

Petitioner has exhausted his State remedies under Art. 11.07 of the Vernon's Ann.Texas Code of Criminal Procedure and has now filed his petition for such a writ in this Court setting forth twelve claims as a basis for granting same. These claims are discussed and reviewed below.

I.

(Petitioner's First, Fourth and Fifth Claims)

These claims allege grounds for relief which relate to the trial Court procedures used to determine the voluntariness of Petitioner's confessions admitted into evidence at his trial: (1) that the trial Court failed to make an independent determination of the voluntariness of defendant's two written confessions and certain oral inculpatory statements made to psychiatrists, all of which were made while Petitioner was in police custody without counsel; and (2) that the trial Court failed to charge the jury to consider the voluntariness of the confessions.

The record before this Court indicates that the trial Court held a preliminary hearing concerning the admissibility of Petitioner's written and oral confessions. (Cause No. 9290, Tr. p. 30) However, the voluntariness of these confessions was apparently not ruled on by the Court at that time and there is no indication that the voluntariness of same was challenged by Petitioner. The main thrust of Petitioner's arguments against the validity of the confessions, raised in its motion to suppress at the trial were directed at his mental capacity and lack of counsel at the time he made them. In Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the Supreme Court held that a defendant had a constitutional right to a fair hearing and reasonable determination on the question of voluntariness,

separate and apart from the truth or falsity of the confession (378 U.S. 376-377, 84 S.Ct. 1774). The rationale of this decision is that a procedure for determining the voluntariness of a confession may come into conflict with the constitutional principle that an accused is deprived of due process of law if his conviction is founded in whole or part upon an involuntary confession, even though true, Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961) and even though there is ample evidence without the confession to support the conviction, Payne v. Arkansas, 356 U.S. 560, 78 S. Ct. 844, 2 L.Ed.2d 975 (1958). Before the confession is submitted to the jury, the record of the case must indicate "with unmistakable clarity" that the trial judge made "a reliable and clear-cut determination of voluntariness of the confession, including the resolution of *disputed facts* upon which the voluntariness issue may depend" 378 U.S. at 391, 84 S.Ct. at 1788 and Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967). (Emphasis added.) Unlike Jackson v. Denno we do not find in this case any clash or dispute as to facts in the record that would place the issue of voluntariness in question. Further the record does not show that the trial Court was requested to make its own independent finding on the question of voluntariness.

In Evans v. United States, 377 F.2d 535 (5th Cir., 1967) the Court agreed that voluntariness must be put in issue to require an independent hearing on that subject when it said:

> "Appellant also contends that the trial court erred in not holding a hearing to determine whether her 'confession' to the agents was voluntary. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Suffice it to say that volun-

tariness was never put in issue. Not only was there no objection but there was no way the trial court could have been aware that the voluntariness of her oral statements to the agents was questioned. See 378 U.S. at 374, 84 S.Ct. at 1774. There must be a limit to the clairvoyance we require the trial courts to possess."

Pinto v. Pierce, 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed. 2d 31 (1967), followed by Delaney v. Gladden, 397 F.2d 17 (9th Cir., 1968) require a challenged confession or that the Court must be made aware of a question of voluntariness in order to present a Jackson v. Denno argument in a federal habeas corpus hearing.

Petitioner relies on Smith v. Texas, 395 F.2d 958 (5th Cir., 1968), a case similar to the one presently before the Court. In *Smith* the defendant was charged with a heinous crime, and the question as to the voluntariness of defendant's confession was raised by both the evidence admitted and the defense attorney's objection (Marion's attorney did not object on the ground of voluntariness to the confession nor does the evidence indicate disputed facts upon which voluntariness may depend). In *Smith,* the Court overruled the objection without any comment but the evidence as to voluntariness was heard by the jury and the issue was submitted to them in the charge. The Court of Appeals for the Fifth Circuit noted that Smith's confession had already been upheld as voluntary by the Texas Court of Criminal Appeals and Federal District and Circuit Courts, however, since the trial Court did not make an independent determination of voluntariness as required by Jackson v. Denno the case was remanded to the State Court for an evidentiary hearing for the Court's determination as to voluntariness as provided for in Article 11.07 of the Texas Code of Criminal Procedure as interpreted by Ex Parte Young,

418 S.W.2d 824 (Tex.Cr.App. 1967). The procedure followed in *Smith,* a remand for an evidentiary hearing rather than reversal and remand for new trial, is in accord with the disposition of the case by the Supreme Court in Jackson v. Denno. "We cannot say that the Constitution requires a new trial if in a soundly conducted collateral proceeding, the confession which was admitted at the trial is fairly determined to be voluntary." 378 U.S. at 395-396, 84 S.Ct. at 1791. *Accord:* Boles v. Stevenson, 379 U.S. 43, 85 S.Ct. 174, 13 L.Ed. 2d 109 (1964), Williams v. Beto, 386 F.2d 16 (5th Cir., 1967).

[1] Petitioner, here, is in no position to complain, for unlike the *Smith* case, the trial Court has been given an opportunity to hear this claim in the evidentiary hearing held December 19, 1968, pursuant to Article 11.07 of Texas Code of Criminal Procedure. At that time, Petitioner and his counsel were present, the record of all past proceedings were introduced into evidence and Petitioner could have taken the stand and subpoenaed witnesses to testify in his behalf. After reviewing the record and arguments of counsel the trial Court made a reliable and clear-cut determination in its Findings of Fact and Conclusions of Law that Petitioner's two written confessions were in fact, voluntary. This procedure complies with the standards set forth in Jackson v. Denno and *Smith.* For this Court to again apply the procedure followed in *Smith* and to order a determination by the trial Court as to voluntariness of the confessions would be repetitious and unnecessary.

Next petitioner contends that it was error for the trial Court not to include instructions regarding voluntariness of the confessions in the charge to the jury. The record shows no request from Petitioner's attor-

neys that the trial Court instruct on voluntariness as such, but their requests in this regard emphasized Petitioner's mental capacity at the time he made the confessions. The trial Court gave an instruction on that issue, instructing the jury not to consider either confession if Petitioner was insane when they were made, referring to its earlier instructions and definitions of insanity. (Cause No. 9290, Tr. p. 44).

[2] The Supreme Court in Jackson v. Denno was concerned only that the question of voluntariness not be confused with the question of guilt. Essentially, all that is constitutionally required is that the trial Court make an independent determination of voluntariness before submitting the confession to the jury for consideration. There appears to be no constitutional requirement in Jackson v. Denno for a further submission to the jury. See United States v. Anderson, 394 F.2d 743 (2nd Cir., 1968). Moreover, the Supreme Court made it clear that the States were to determine their own procedure: "Whether the trial judge, another judge or another jury, but not the convicting jury, fully resolves the issue of voluntariness is not a matter of concern here. To this extent * * * the States are free to allocate functions between judge and jury as they see fit." Jackson v. Denno, 378 U.S. at 391 n. 19, 84 S.Ct. at 1788-1789. At the time of Petitioner's trial Texas apparently did not follow any uniform and consistent procedure for determining the voluntariness of a confession. Texas v. Graves, 380 F.2d 676, 680-681 (5th Cir., 1967); Smith v. Texas, 236 F.Supp. 857 (S.D.Tex. 1965). But see Fernandez v. Beto, 281 F.Supp. 207 (N.D.Tex. 1968). (Under Texas procedure today, the Massachusetts Rule is the standard procedure. Tex. Code Crim. P., Art 38.22). However, the case upon which Article 38.22 is based,

Lopez v. State, 384 S.W.2d 345 (Tex.Cr.App. 1964) did not require *per se* the jury to be instructed on the issue of voluntariness as the Code now specifically provides: instead, the Court said, "The jury may and shall, *upon request of the defendant,* be instructed to the effect that they cannot consider the confession unless they believe beyond a reasonable doubt that it was voluntarily made." 384 S.W.2d at 348. (Emphasis added.) The only request by Petitioner concerning jury instructions regarding the confessions related to Petitioner's insanity at the time such confessions were made, and these instructions were given. Also, it is again pointed out that the evidence introduced was not conflicting, and the question of voluntariness was not raised by the evidence.

Petitioner also relies on Breedlove v. Beto, 404 F.2d 1019 (5th Cir., 1968). In *Breedlove* the confession in question was never introduced in evidence, however, it was injected into the trial for impeachment purposes, and to rebut petitioner's claim of self-defense. Having plead guilty the only question before the Court was whether petitioner had a viable affirmative defense. The Fifth Circuit held that the questions and answers relating to the confession were a sufficient use of the confession to invoke the rule of Jackson v. Denno. However, the Court remanded for a new trial rather than an evidentiary hearing because "Neither the trial judge nor the jury passed on the voluntariness" of the statement used. Just as in the issue before this Court, in *Breedlove* there was no contention made that the statement was involuntary and no objection to its admission as evidence was made on the ground of involuntariness. In spite of this apparent similarity *Breedlove* is distinguishable from Marion in two respects: (1) There has now been held an independent

hearing by the 72nd District Court (as used in *Smith*) determining that the confessions were voluntary, and (2) the trial Court in Marion did give a requested instruction on insanity in connection with the confessions, which was the only aspect of voluntariness raised by the evidence.

There is no doubt that Marion could have raised the issue of voluntariness in its traditional context, however it is apparent from the record that counsel was attacking the confession on a narrow ground, i.e., want of counsel and lack of mental capacity. Petitioner's trial occurred just prior to *Escobedo* and it seemed clear that the former challenge was specifically kept narrow in order to raise this important question. This issue was not a jury question and therefore was not submitted to them in the charge. However, the issue regarding Petitioner's sanity at the time he gave the confessions was submitted in the jury charge. This was the issue urged by Petitioner; the jury heard evidence thereon and the trial judge instructed them accordingly. No objections were raised to this procedure and as a result this aspect of voluntariness, as affected by sanity, the only one raised at trial, was considered by the jury. See Hackathorn v. Decker, 369 F.2d 150, 152-157 (5th Cir., 1967). Moreover, Jackson v. Denno does not require the trial judge to hold a hearing *sua sponte* regarding the question of voluntariness; it merely deals with the procedure to be followed when the issue is raised by objection or otherwise. Lundberg v. Buchkoe, 389 F.2d 154 (6th Cir., 1968); Evans v. United States, 377 F.2d 535 (5th Cir., 1967); Woody v. United States, 126 U.S.App.D.C. 353, 379 F.2d 130 (1967); Williams v. Anderson, 362 F.2d 1011 (3rd Cir., 1966).

[3] Under this set of circumstances this Court is

of the opinion that the issue as raised was properly submitted to the jury in paragraph 28 of the Court's instructions (Cause No. 9290, Tr. p. 44). Therefore only a remand for an evidentiary hearing would be required. However, since this has already been accomplished there is no need for this Court to take further action.

[4] In regard to the oral inculpatory statements made to psychiatrists, there is nothing in the record indicating that any such statements were introduced in evidence against Petitioner by either Dr. Youngblood or Dr. Shaw whose testimony Petitioner sought to exclude in its motion to suppress. They testified concerning Petitioner's sanity at the time he made his confessions and his ability to recollect facts, an issue raised by Petitioner. After reviewing the record the most prejudicial statement this Court could find is far from being "highly inculpatory." See Testimony of Dr. Shaw, Statement of Facts v. III p. 651.

II.

(Petitioner's Second Claim)

[5] Petitioner alleges error in that the trial Court refused to allow pre-trial discovery of the confessions. The Supreme Court has recognized that "better practice" would be to make confessions available by pre-trial discovery, but no reversal is required unless prejudice is shown. Cicenia v. Lagay, 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 (1957); Leland v. Oregon, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1951). No prejudice has been shown in this case. Moreover, at the time of Marion's trial, the Texas law that neither the accused nor his attorney was entitled to pre-trial inspection of confessions, was upheld as constitutional. Hackathorn v. Decker, 369 F.2d 150, 152-153 (5th Cir.,

1966), cert. den. 389 U.S. 940, 88 S.Ct. 301, 19 L.Ed.2d 294 (1966).

III.

(Petitioner's Third and Sixth Claims)

[6] Petitioner's claims concerning the denial of right to counsel at the time he waived his examining trial and gave the confessions have been heard and passed upon following a full, fair and adequate evidentiary hearing and therefore will not be considered by this Court. See Marion v. Harrist, 363 F.2d 139 (5th Cir., 1966); Marion v. Texas, 387 S.W.2d 56 (Tex.Cir.App. 1964).

IV.

(Petitioner's Eighth Claim)

[7] Next Petitioner contends the trial Court's instruction to the jury on the question of insanity was inadequate, being so vague and indefinite as to deprive him of constitutional due process under the Fourteenth Amendment. In Blake v. United States, 407 F.2d 908 (5th Cir., 1969), the Fifth Circuit adopted the definition of insanity recommended in §4.01 of the Model Penal Code, but this definition is not binding on the State of Texas. The charge of the trial Court was the "right-wrong" test which is still used in many states and has never been held constitutionally inadequate.

V.

(Petitioner's Seventh and Ninth Claims)

Petitioner here attempts to secure his writ upon the premise that the jury selection process violated the guidelines of the Supreme Court of the United

States in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Specifically, Petitioner claims that prospective jurors were systematically excluded by the Court if it appeared that they were conscientiously opposed to the infliction of death as a punishment for a crime, and that such systematic exclusion deprived him of a fair trial and violated his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States.

[8] Petitioner is correct when he asserts that *Witherspoon* prohibits the sentence of death if the jury was chosen by the exclusion of veniremen for cause if they voiced only general objections to the death penalty or expressed conscientious or religious scruples against its infliction. Too, they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. On the other hand if it appears that a prospective juror was excluded because he or she is not willing to consider all of the penalties provided by state law or that such jurors would vote against the penalty of death, regardless of the facts and circumstances that might emerge, then such exclusion for cause would be proper.

After a full, fair and complete evidentiary hearing before the 72nd District Court of Lubbock County, Texas, that Court made certain findings of fact concerning the methods used in selecting jurors and excluding same for cause at Petitioner's trial. The effect of such fact findings was that the trial Court did not exclude for cause any jurors in such a manner as to violate *Witherspoon* guidelines.

It is the finding and conclusion of this Court that

there was more than sufficient evidence at the evidentiary hearing to support the State Court's findings of fact in this regard and such findings are in all things here found to be correct.

However, in view of the gravity of the matter before this Court, this Court has made an independent examination of the 602 pages of voir dire examination of the prospective jurors at Petitioner's trial. This examination was made for the purpose of an independent determination by this Court of the facts of such voir dire examination and for the purpose of reaching a conclusion as to whether *Witherspoon* guidelines were followed or violated.

A total of 71 prospective jurors were examined by the attorneys before 12 were chosen to serve as the trial jury. (Actually 13 were chosen but one was excused after being sworn for medical reasons.) 26 of these 71 can be classified as having been excused for cause in connection with the question of the imposition of the death sentence. Each venireman was first asked if he or she had any conscientious scruples against the infliction of death as a penalty for crime. If the answer was "Yes," the questioning in most cases went further. (Appendix "A" to this opinion contains the name of each prospective juror that was eventually excused for cause based on questions asked and connected with the assessment of the death penalty.) The pertinent part of the questions and answers on this point are quoted below each such venireman. (Appendix "B" is a list of the names of the remaining 71 jurors, and how they were excluded or sworn as jurors.)

While it can be said that each of these 26 had conscientious scruples against the death sentence, the analysis does not reveal that there was any systematic

exclusion by the Court of these 26 because of such scruples, as claimed by Petitioner. On the contrary, the voir dire in nearly every instance went further so as to inquire if, regardless of the facts and circumstances of the case, would that juror still refuse or be unable to vote the death penalty. In 16 of the 26, the answers are unequivocal and without doubt, that that particular juror would not vote for death regardless of the facts or circumstances. In one other instance, although there was the existence of such scruples in her mind, the record indicates that Mrs. Robbins was excused because she would require proof of guilt beyond a "shadow of doubt" rather than beyond a "reasonable doubt."

Of the remaining 9 of the 26 so classified, two were excused with the consent and agreement of defendant's counsel, and another had additional reasons for being excused other than his scruples against the death penalty. One person, the Court found, was too hesitant in her answers. Others testified "He has no right to take a man's life" or "I don't believe in capital punishment" or "I don't believe I could assess the death penalty." All of these answers imply strongly, if not expressly, that, regardless of facts and circumstances, that juror could or would not assess the death penalty.

At the Marion trial, unlike *Witherspoon,* the jurors were not excluded by an intentional application of an improper standard. There were three prospective jurors, Mrs. Hobbs, Mr. Moore and Mr. Speck who were apparently excused, according to the record, solely because they had conscientious scruples against the death penalty. At the same time, there were several members of the jury panel who expressed reservations about the death penalty even though they admitted under questioning that they could conceive of circum-

stances under which they could assess the punishment. Mr. Thomason when asked if he had any conscientious scruples concerning the death penalty replied, "I wouldn't know whether I do." Q. * * * "Do you feel you could assess the death penalty in a case where the law provides for it?" A. "I never did believe in anything like that but I guess I could." Later, as is turned out, Mr. Thomason was excused by agreement for medical reasons and was not excused because of his beliefs concerning the death penalty. (Voir dire examination p. 178-80). Mr. Bray replied, "No, sir, I —yes or no, with reservations, of course * * *" "Well it would all depend on the circumstances." (Voir dire examination p. 199-200). Mrs. Hedges answered, "If the evidence proved true, then I would not have any scruples." (Voir dire examination, p. 356). Mrs. Splawn's initial response was, "I feel I would have to have more evidence. I mean I cannot decide right now." Later after further questioning as to any situation she said, "Well, I think I could * * *" Q. "And you could if you felt the facts justified it." A. "Yes." (Voir dire examination, p. 421-22.)

In spite of their reservations and scruples concerning the death penalty, as set forth above, Mr. Bray, Mrs. Hedges and Mrs. Splawn actually served on the trial Court jury and Mr. Thomason was first accepted, but then was excused for medical reasons. Instead of a blanket excuse of all jurors with such conscientious scruples, three with these conscientious scruples actually served as jurors in this case.

[9] The analysis above indicates that there was no pattern or scheme or plan by the Court to exclude, systematically or otherwise, all jurors who had such scruples. On the other hand, the voir dire transcript indicates time after time, when the Court itself would

question the prospective juror if he or she could under any fact or circumstance assess the death penalty, and upon receiving a negative answer, would excuse for cause that particular juror. (See voir dire examination transcript pages 269, 413, and 533.) The same type of cross-examination by defendant's attorney also elicited similar answers.

The trial Court, at the voir dire, appeared to be conscious of the *Witherspoon* guidelines although they had yet to be enunciated by the Supreme Court, and the scheme, if any existed, was to make certain that those with conscientious scruples not be excused for cause, unles they further indicated on voir dire that under no facts or circumstances that could particular juror vote to assess the death penalty.

This was a permissible exclusion under *Witherspoon,* and Petitioner's seventh and ninth claims are not merited and these claims must be rejected.

As stated in Bell v. Patterson, 402 F.2d 394, 399 (10th Cir., 1969), "viewing the jury selection process in its entirety by weighing the responses of the excluded and non-excluded prospective jurors, it cannot be said that 'the State crossed the line of neutrality' and entered the domain of the impartial jury proscribed by the Sixth and Fourteenth Amendments." Under the circumstances, this Court is of the opinion the jury, as constituted, expressed the conscience of the community by reflecting a cross section of society sufficient to satisfy the standards set forth in *Witherspoon.*

VI.

(Petitioner's Tenth, Eleventh and Twelfth Claims)

[10, 11] Petitioner's tenth and eleventh claims are

the same as those now pending before the Supreme Court in Maxwell v. Bishop, 393 U.S. 997, 89 S.Ct. 488, 21 L.Ed.2d 462 (1969): (1) Does State practice of allowing the jury discretion to assess the death penalty without directions or guidelines violate due process? and (2) Does the single verdict procedure used in petitioner's trial violate constitutional due process by forcing petitioner to choose between presenting evidence to mitigate punishment or maintain his privilege against self-incrimination on the question of guilt? Petitioner also contends that Texas juries tend to discriminate on grounds of race in capital sentencing for crimes against white persons. This claim is also raised in *Maxwell,* but Petitioner here has presented no statistical evidence to this effect and therefore this allegation is a mere conclusion and without merit. The claims of Petitioner relating to the single-verdict procedure and jury guidelines have been raised before and have been denied. See e.g. Sims v. Eyman, 405 F.2d 439 (9th Cir., 1969), Segura v. Patterson, 402 F.2d 249 (10th Cir., 1968). Realizing that *Maxwell* is pending still until otherwise known, the above cases represent the presently existing law which this Court will follow.

[12] Finally Petitioner's twelfth claim is that the imposition of the death penalty upon Marion constituted cruel and unusual punishment under Texas Law. Sims v. Eyman and Bell v. Patterson, supra, dispose with this question as related to Petitioner's due process claims made above. In regard to the claim that the death penalty is *per se* cruel and unusual punishment, this Court is of the opinion that such determination is one to be made by the Legislature rather than in the Courts.

Accordingly Petitioner's application for a writ of habeas corpus should be and is denied.

APPENDIX "A"

1. *O. D. Rhodes,* p. 41, voire dire examination:

Q. "You can conceive of no set of facts, regardless of the severity or aggravation of them, which should permit you as a juror to vote and write a death sentence in a case of murder, is that right?"

A. "I believe—yes, sir, that's right."

2. *C. A. McDonald, Jr.,* p. 57, voir dire examination:

Q. (on cross-examination) "Is there any fact situation under which you feel justified in giving the death penalty?"

A. "Well, I just don't feel like I'd like to have any part in taking another human being's life."

Q. "Could you in a proper case do it, whether you would like to do it or not?"

A. "I don't believe I would."

3. *Mrs. H. E. Hughes,* p. 79 voir dire examination:

Q. "You do not feel that you personally could ever assess the death penalty?"

A. "No, Sir."

Both parties agreed to the challenge for cause of Mrs. Hughes.

4. *Mrs. Gertrude McCasland,* p. 81, voir dire:

Q. "Under any condition can you conceive of any crime or any murder, I'll put it that way, for which you could? (Referring to assessment of death penalty)

A. "In my opinion there is no reason for putting another person to death."

5. *Mrs. David J. Hobbs,* p. 103, voir dire:

The Court: "Mrs. Hobbs, do you have any conscientious scruples against the infliction of the

death penalty as a punishment for a crime in a proper case? I'm talking about if you're selected on the jury."

A. "Well, that's very tough to answer."

The Court: "Well"

A. "I'm afraid I would. I'm afraid I would."

6. *B. A. Barasch,* p. 105, voir dire:

A. "Yes, I don't believe in the death penalty."

Q. "All right. You do not feel that under any conditions for any crime it should be assessed and you could * * *."

A. "No."

Q. "* * * not do it, is that right sir?"

A. "No."

7. *Jerry R. Dunn,* p. 163, voir dire:

A. "Well, I personally don't feel that the death penalty is ever justified because I don't think it particularly solves anything."

Later on cross-examination:

Q. "In other words, could you inflict the punishment in what you would consider a proper case?"

A. "I think I probably could."

State's challenge for cause granted because Court said there had been too much hesitation in Mr. Dunn's testimony.

8. *M. W. Moore,* p. 166, voir dire:

Q. "Do you have any conscientious scruples against the infliction of the death penalty as a punishment for crime?"

A. "Yes, Sir."

Q. "You do not believe that you could do it yourself * * *"

A. "No, Sir."

9. *L. P. McKinley,* p. 237, voir dire:

Q. "Can you conceive of any fact situation where you could consider giving the death penalty?"

A. "No."

10. *M. H. Edwards,* p. 269, voir dire examination:

The Court: "Can you conceive of any case where you might vote the death penalty, Mr. Edwards?"

A. "No, Sir, I don't believe I could."

11. *Mrs. Ruth Robbins,* p. 322, et seq., voir dire:

Excused by agreement of the parties when she testified she would assess death penalty only if defendant proven guilty "beyond a shadow of a doubt" rather than reasonable doubt. Later in response to Court's inquiry, said that guilt "would have to be beyond a shadow of a doubt" p. 327.

12. *David Nutt,* p. 368, voir dire:

Q. "I ask you, do you have any conscientious scruples or religious scruples against the infliction of death as a penalty for crime?"

A. "Yes, Sir, I don't believe in it, it's * * * I don't believe that a man has a right to take a man's life."

13. *L. L. Ahord,* p. 393, voire dire examination:

Q. "I would like to ask you, sir, if you have any conscientious scruples concerning the infliction of the death penalty as a punishment for crime in a case where the law provides for it and the facts surrounding the situation will warrant the assessment of that punishment?"

A. "I don't believe in capital punishment."

14. *Rudolph Peel,* p. 413, voir dire examination:

The Court: "You can conceive of no situation where you could vote the death penalty if you were a juror?"

A. "No, I don't think so."

15. *Mrs. Alvin Griffin,* p. 414, voir dire examination:

Q. "Do you have any conscientious scruples which would prevent you from * * * or I'll say concerning the infliction of death as a punishment for crime wherein it's a case where the law provides for it and the facts surrounding it warrant that punishment?"

A. "Yes, I do."

Q. "You do not believe that you could assess the death penalty?"

A. "No, I don't."

16. *Mrs. Fae Sheppard,* p. 447, voir dire:

Q. "Now then, my question to you is, do you have any conscientious or religious scruples against the infliction of the death * * *"

A. "Yes, sir."

Q. "* * * or a penalty for crime in a proper case?"

A. "I do."

Q. "What?"

A. "I don't believe in death."

Q. "You don't believe in giving death for crime in a proper case * * *"

A. "No."

Q. "* * * You being the judge of what the proper case is, is that right?"

A. "I don't believe in it."

Defendant agreed to excuse this venireman.

17. *Wenifred S. McKee,* p. 450, voir dire:

After stating he had conscientious scruples about the death penalty:

Q. (on cross examination by defendant) "You just don't believe in it as a basic philosophy, is that it?"

A. "Well, that right."

Defendant agreed to excuse this venireman.

18. *S. B. Nelson,* p. 464, voir dire:

(On cross examination)

Q. "Do you think you could give the death penalty under certain circumstances, in the proper case?"

A. "Under what?"

Q. "Under certain circumstances, under a proper case, do you feel like you could administer it?"

A. "Well, I think I'd rather not. I could go a life term but not a death sentence."

Defendant thereupon agreed to excuse this venireman.

19. *Homer L. Bogard,* p. 351:

A. "Well, I don't believe in that capital punishment."

Q. "You don't believe in the death penalty?"

A. "Not in capital punishment."

Q. "Well, that's what I'm talking about. You, yourself, could not vote in any case—I'm not talking about this case, in any case for the death penalty? Is that right?"

A. "That's right."

20. *M. E. Cobb,* p. 533:

After testifying that he could not personally give the death penalty:

The Court: "You can't conceive of any case where you could vote for the death penalty—any state of facts in a case that you could vote for the death penalty if you were a juror in a case?"

A. "I don't believe so, your Honor."

21. *T. A. Peel,* p. 535, voir dire examination:

Q. "Can you conceive of any crime, regardless of what the law says about it, can you conceive of any crime bad enough for you to vote for the death penalty?"

A. "I don't * * * no, sir."

22. *Robert A. Burhart,* p. 536, voir dire examination:

A. "I don't believe that God's law provides for it, in my case. I wouldn't vote the maximum penalty."

Q. "You personally would not vote for the maximum penalty * * *"

A. "That's correct."

Q. "* * * in a case regardless of what the facts were in it?"

A. "That's correct."

23. *Bill Westerfield,* p. 569, voir dire examination:

Q. Do you have any conscientious scruples concerning the infliction etc. * * *"

A. "Yes, sir, I do. I wouldn't under any circumstances."

Q. Assess the death penalty?"

A. "No, sir, I would not."

24. *Mozelle F. Cobb,* p. 571, voir dire examination:

Q. "Uh-huh, do you have scruples concerning the assessment of the death penalty?"

A. "Yes, sir, I do."

Q. "Do you feel that under any circumstances that you, yourself, could vote to assess the penalty if you found the man guilty of crime?"

A. "No, I couldn't."

25. *W. J. Blair,* p. 572, voir dire examination:

Q. "Do you have conscientious scruples concerning the infliction of the punishment of death as a penalty for crime?"

A. "Yes, sir, I do. I wouldn't."

Q. "You would not assess the death penalty?"

A. "No, sir, I wouldn't under no circumstances."

26. *J. W. Speck,* p. 589 et seq., voir dire examination:

A. "* * * I would ask you, sir, if you have any conscientious scruples concerning the infliction of the penalty of death as a punishment for crime where the law provides it, as it does in a case of this nature, and the facts were sufficient to show you that it should be assessed or to show that it should be?"

A. "That's pretty rough."

Q. "Yes, sir, I know it's rough. It's a rough situation."

A. "I'd hate awful bad to say that a man should be—should die, but I—"

Q. "Well, —"

A. "— I may —"

Q. "— I understand that, I don't think any of us

would take that lightly, Mr. Speck. The question is, and it boils down to this, it's your conscience we're talking about and I'm asking you about your conscientious scruples. Do you feel that you could sit on a jury and if the State met the burden of proving the man guilty, do you feel that you could personally vote to put him to death?"

A. "It's doubtful. I might but it's doubtful."

Mr. Griffin: "Your Honor, I'd challenge for cause on this answer."

Mr. Blanchard: "Let—may I ask one question, Judge?"

The Court: "Yes, sir."

(On cross examination, by Mr. Blanchard)

Q. "Mr. Speck, do you concede—can you conceive of any case—now, we're not talking about this one, can you conceive of any situation where you could sit as a juror and because of the circumstances surrounding the case, if you were convinced that a person who was being tried was guilty and the facts were such—of such a nature and degree that you could render a verdict of death in that case?"

A. "I believe that if the proof was showed where it was beyond hope, I would render the verdict, yes."

Q. "Now, this burden, of course, is not the burden I'm talking about. In other words, the State has the burden of proving a defendant guilty in a case. They—they're required to prove him guilty beyond a reasonable doubt. In other words, that's as best could be described a doubt with reason. If it were beyond that point and the circumstances were such that you felt—a person felt that it should be, could you in that case render a verdict if you were sure beyond a reasonable doubt that he was guilty and so on?"

A. "Well, that's—let me put it this way, maybe I

misunderstood it. If I felt that the man was hopeless, so to speak, I would render a verdict, yes, sir."

APPENDIX "B"

(Jurors questioned on voir dire examination in addition to those shown in Appendix "A")

Truman E. Bradshaw, excused by State—preemptory challenge.

Samuel O. Thomas, excused by State—preemptory challenge.

Lester Conner, excused by Defendant—preemptory challenge.

W. L. Patterson, accepted as a juror.

C. T. Read, challenged for cause regarding his attitude regarding alcohol and temporary insanity.

J. A. Brunson, challenged for cause—had opinion as to guilt or innocence.

Cecil Griffin, excused by State—preemptory challenge.

John P. Cates, challenged for cause—had opinions regarding case.

A. L. Davis, excused for cause, had fixed opinion about sanity of Defendant.

H. P. Clemons, excused by State, preemptory challenge.

Gus Thomason, excused by agreement because of illness.

Richard W. Brag, selected as juror.

Lucille M. Stewart, excused by State—preemptory challenge.

W. C. Lawrence, excused by State, preemptory challenge.

Mrs. Paul Newman, excused for cause of pre-existing opinion as to case.

Albert Salones, excused by Defendant, preemptory challenge.

R. E. Sikes, sworn as a juror.

C. H. Irwin, excused by State, preemptory challenge.

Mrs. Ruth Seveland, sworn as a juror.

Donald Jackson, excused by Defendant, preemptory challenge.

Mrs. Herman Biggerstaff, sworn as a juror.

Donald H. Finkner, excused by Defendant, preemptory challenge.

Mrs. Charles R. Hedges, sworn as a juror.

Roy D. Sifford, both sides challenge for cause—fixed opinions about case.

Harold R. Bolton, challenged for cause, prejudiced about guilt or innocence.

Mrs. Eula B. Campbell, excused by State, preemptory challenge.

Boyce M. Irwin, sworn as a juror.

Troy Bartlett, sworn as a juror.

W. J. Pierson, excused by defendant's preemptory challenge.

E. M. Willbanks, excused by defendant's preemptory challenge.

Mrs. Robert C. , excused, has opinion about case.

Mrs. Robert Splawn, sworn as a juror.

R. C. Standifer, excused by defendant's preemptory challenge.

H. F. McInroe, excused by defendant's preemptory challenge.

Richard E. Featherton, excused by State's preemptory challenge.

L. V. Light, excused for cause—because he would require proof of insanity more than required by law.

Chester H. Smith, sworn as a juror.

William D. Blevins, excused by defendant's preemptory challenge.

W. F. Martin, excused because of medical reasons—too deaf to hear.

James O. Acuff, excused—had a preconceived idea about defense.

John L. Dea, excused by State's preemptory challenge.

Buddy Hughes, excused—relationship with deceased such that he could not be a fair juror.

O. R. Cunningham, sworn as a juror.

J. W. Hunt, excused, pre-conceived idea about insanity.

B. L. McCasland, sworn as a juror.

APPENDIX "D"

JAMES LEE MARION,

Appellant

v.

THE STATE OF TEXAS,

Appellee

NO. 37297

Court of Criminal Appeals of Texas
Dec. 2, 1964

Rehearing Denied Feb. 3, 1965

Second Motion for Rehearing Denied March 10, 1965

Defendant was convicted of murder. The 72nd Judicial District Court, Lubbock County, Victor H. Lindsey, J., entered judgment, and the defendant appealed. The Court of Criminal Appeals, Morrison, J., held that evidence sustained the conviction, and that statement made by defendant during and in furtherance of his flight from scene of homicide was admissible.

Conviction affirmed.

1. Homicide #250

Evidence sustained murder conviction.

2. Criminal Law #517(1)

Confessions, which were made prior to return of indictment, were admissible, though defendant was not represented by counsel when confessions were taken, where defendant was advised of his right to remain silent, and it was suggested that he could telephone counsel.

3. Criminal Law #538(3)

Statement in murder confession that defendant was

drunk when he broke into house of deceased was not an exculpatory statement, though expert witness had testified that defendant suffered from mental condition which, when stimulated or aggravated by use of alcohol, rendered defendant temporarily insane. Vernon's Ann.P.C. art. 36.

4. Criminal Law #675

Coroner was properly permitted to testify in murder prosecution as to injuries which he observed, though other witnesses had previously testified about those injuries, where testimony of coroner and testimony of other witnesses were not identical.

5. Witnesses #252

Trial court did not err in permitting patholigist in murder prosecution to use plastic skull, which was a correct replica of the human skull, to make testimony clearer for jury as to cause of death.

6. Homicide #174(8)

Statement made by defendant during and in furtherance of his flight from scene of homicide was admissible in murder prosecution.

Carl Steckelberg, Garland Casebier, Midland, for appellant.

Joseph H. Mims, Dist. Atty., Midland, Alton R. Griffin, Dist. Atty., Lubbock, and Leon B. Douglas, State's Atty., Austin, for the State.

MORRISON, Judge.

The offense is murder, the punishment, death.

The Turner house in Midland occupied an entire city block. Mr. Turner was away and his wife was at home alone. At approximately 4:12 a.m. on October 29,

three of the Turners' neighbors heard screams somewhere in that neighborhood. Neighbor Galley notified the police and within four minutes patrols reached the area. They cruised throughout this vicinity until daylight, but were unable to discover anything suspicious. At 7:40 the Turners' maid, Juanita Young, appeared for work and when she observed muddy tracks both outside and inside the house, she retreated to a neighbor's home and called Mr. Scharbauer, Mrs. Turner's son-in-law. He arrived with his wife and asked the neighbor to call the Sheriff, and the Scharbauers and the maid proceeded to the Turner home. He and the maid ascended the stairs and discovered that Mrs. Turner's bedroom door had been battered in with a pinch bar and inside they found her lifeless blood stained body on the floor. They descended the stairs and went outside to greet the Sheriff. Mrs. Scharbauer was left alone in the library crying. An armed colored man, whom she identified as the appellant, entered and asked her if she lived there and when she answered in the negative, hit her on the head with the pistol he was carrying. At this juncture Scharbauer, the Sheriff and a deputy entered and appellant surprised them and, at pistol point and by means of threats to further harm Mrs. Scharbauer, lined them up in the library. After some hesitation appellant abandoned his dominion over the four and ran out the front door. The maid and the yard boy were outside and saw him leave. Chase ensued, but he was able to evade his pursuers. Some four hours later he was apprehended in the attic of a small business armed with a .380 revolver. On the floor in the room below the entrance to the attic was found an identification holder containing a picture of Mr. Turner.

Soon after the discovery of Mrs. Turner's body the

coroner arrived. He and a pathologist testified that massive bruises about the face and head, administered by a weapon similar to the .380 pistol, caused Mrs. Turner's death. The pistol was shown by expert testimony to have hair comparable in many respects to samples taken from the corpse imbedded in the butt and clip thereof. Samples of mud taken from appellant's shoes were shown to have the same soil characteristics as that found in the Turner home. Three buttons found in or near Mrs. Turner's bedroom matched those on the shirt appellant was wearing and from which three had been recently torn. Plaster casts were made of footprints outside the Turner's window and appellant's shoes were shown to fit the same perfectly. Appellant's pants had flecks of human blood thereon.

We have concluded that the above is a fair summary of the many witnesses, lay and expert, as to the physical facts of this case which took a week to try.

After appellant's arrest at 11:50 a.m., he was interrogated by Officers Gideon and Morales and at 1:15 p.m. signed a confession in which he recites that the murder occurred as the result of a burglary and attempt to rob Mrs. Turner. The appellant had remained in the big house until the next morning when a loud noise awoke him and he escaped by means of placing the people in the house in fear of being shot. Prior to the taking of the confession appellant was warned by Officer Gideon of his right to remain silent concerning the offense about which this statement is made. Officer Gideon affirmatively answered to appellant's counsel's question, "Did you suggest to him that he should have counsel?", and stated that appellant had said that he just wanted to get it over with. He testified further that there was a telephone nearby and that he told appellant he might use it if he wanted

to call a lawyer. At 3:50 p.m. appellant was arraigned before the Justice of the Peace who testified in answer to appellant's counsel's question that he felt he had performed his duty toward appellant when he told him of his rights as a citizen and asked him if he wanted a lawyer.

Dr. Shaw, a psychiatrist, examined appellant later in the afternoon for 10 or 15 minutes, found no marks or physical injury, and found him to be oriented as to time, place and identity. On October 30, Dr. Shaw and Dr. Youngblood, also a psychiatrist, examined appellant psychiatrically for approximately an hour and again on November 11, for a like period of time and expressed the opinions that appellant knew the consequences of the act at the time of its commission and knew the difference between right and wrong.

On November 15, Officer Morales, the Sheriff and an assistant district attorney being present, again interrogated appellant, warned him of his right to remain silent, advised him that anything he might say could be used against him, and a fuller confession was reduced to writing and signed by appellant. Following this, appellant was again examined by Dr. Shaw.

Appellant was not called as a witness, but Dr. Kovnar, a psychologist, testified that he had given appellant repeated tests used by those in his profession and expressed the opinion that appellant was of dull-normal intelligence with a propensity for homosexuality and reacted to primitive impulses when given alcohol. He did not express an opinion as to whether or not appellant knew the difference between right and wrong.

Dr. Schlenker, a psychiatrist, testified that he had conferred with Dr. Kovnar and had examined appellant for about 40 minutes. He expressed the opinion

that the psychiatric tests showed that appellant would release hostilities when under the influence of alcohol. In answer to a hypothetical question, he testified that in his opinion appellant did not understand the nature and quality of his act or know that he would be punished if he were caught.

[1] The jury resolved the controversial issue in the case when they found appellant to be sane, and we find the evidence sufficient to support the conviction.

[2] Appellant's objections to the admission of the confessions are presented in his motion to exclude the same filed before testimony was taken and renewed upon the offer of each confession. The principal grounds for such objections are that he was not represented by counsel at the time the confessions were made. Principal reliance is had upon Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, but in that case it was affirmatively shown and the opinion of the Court emphasizes that Escobedo requested and was denied an opportunity to consult with his lawyer.

We here observe that appellant was advised of his right to remain silent, had it suggested to him that he could call counsel, and a telephone was made available for his use before either confession was made. Appellant declined to use the telephone and failed to make any effort to comply with the suggestion.

[3] He next contends that the statement found in his confession, "I was drunk when I broke into the house" constitutes an exculpatory statement. Drunkenness is no excuse for the commission of crime, Article 36, Vernon's Ann.P.C., and the trial court so told the jury. He contends that because his expert witnesses had testified that appellant "suffered from a mental con-

dition which stimulated or aggravated by the recent use of alcohol rendered him temporarily insane," and because his witness White testified that he was intoxicated on the night in question, the phrase "I was drunk" was exculpatory. "I was drunk" standing alone is not exculpatory. It was appellant and not the State who offered the additional testimony which he says made the statement "I was drunk" exculpatory. The court was not required to so charge.

[4] Appellant next contends that the court erred in permitting Coroner Ellis to testify as to injuries which he observed on the grounds that other witnesses who had preceded Ellis to the witness stand had already testified about such injuries. He cites the admonition contained in the majority opinion on rehearing in Kennedy v. State, 161 Tex.Cr.R. 303, 276 S.W.2d 291. He concedes that their testimony was not identical and we agree. It is only identical testimony which the majority frowned upon in Kennedy.

[5] He further contends that the court erred in permitting the pathologist to use a plastic skull which was manufactured by the Medical Plastic Laboratory of Gatesville, Texas, which she stated was a correct replica of the human skull, in order to make her testimony clearer for the jury as to the cause of death. Surely such a model does not come within the ghastly picture or bloody clothes rule expressed in Borroum v. State, 168 Tex.Cr.R. 552, 331 S.W.2d 314 (since overruled) and Hunter v. State, 161 Tex.Cr.R. 225, 275 S.W.2d 803.

The trial court submitted the defense raised by the testimony of appellant's witnesses, and we overrule his contentions that the court erred in not granting his motion for new trial based upon the contention that

the jury verdict was against the preponderance of the evidence.

[6] His last contention is that the court erred in admitting the testimony of the Sheriff as to a statement made by appellant while he was holding the four under his domination at gun point in the library. The Sheriff testified that Mr. Scharbauer asked appellant's permission to allow him to attend to his wife's injuries. Appellant denied such request and instructed him to "straighten up there" and said, "Do you want her to live?" Clearly the statement was made during and in furtherance of the appellant's flight from the scene of the homicide and therefore admissible.

Finding no reversible error, the conviction is affirmed.

APPENDIX "E"

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1969

NO. 28421

D. C. Docket No. Civil Action No. 5-534

JAMES LEE MARION,

Petitioner-Appellant,

v.

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas

Before GEWIN, GOLDBERG and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause

be, and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court.

It is further ordered that respondent-appellee pay to petitioner-appellant, the costs on appeal to be taxed by the Clerk of this Court.

November 6, 1970

Issued as Mandate: